United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

No. 74 - 1101 74-1101

UNITED STATES COURT OF APPEALS

For The Second Circuit

Docket No. 74 - 1101

IN THE MATTER

OF

ALPHONSE PERSICO,

Appellant

B

P/S

On Appeal From The United States District Court
For The Eastern District Of New York

BRIEF FOR THE APPELLEE

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Statement

On January 23, 1974, appellant was called as a witness before a special grand jury, sitting in Brooklyn, New York, which is investigating racketeering influence in legitimate business in violation of 18 U.S.C. § 1962. Appellant refused to answer questions concerning his employment, invoking his privilege against self-incrimination. Subsequently appellant was granted use immunity pursuant to 18 U.S.C. §§ 6002 and 6003, however appellant asked to be brought before a Judge so that he could move to suppress evidence derived from alleged "unlawful" electronic surveillance at his home. The Government moved before the Honorable Orrin G. Judd to hold appellant in contempt of the valid immunity order signed by the Honorable John R. Bartels on December 28, 1973. Judge Judd held the appellant's claim to be premature and ordered him to answer the grand jury's question concerning his employment or be cited for contempt.

The appellant returned to the grand jury, answered several questions concerning his employment, but refused to answer whether he was employed at or owned any other businesses, again claiming the questions were the result of "illegal" electronic surveillance. The Government, before Judge Judd, stated the questioning was derived from electronic surveillance, but denied it was illegal referring to its prior representation to the Court that the electronic surveillance was pursuant to three court orders - March 21, 1973 original order signed by Judge Bartels to intercept oral communications at the appellant's home for fifteen days; April 9, 1973 extension order signed by Judge Bartels to intercept oral communications at the appellant's home for fifteen days; and May 8, 1973 original order signed by the Honorable Edward R. Neaher to intercept oral communications at the appellant's home for fifteen days. Judge Judd inspected the orders in-camera and held them to be proper, denied appellant's claim to a suppression hearing, and ordered appellant to answer the grand jury's questions or be held in contempt.

The appellant again returned to the grand jury, stated he was the boss of an illegal gambling organization but refused to identify those individuals working for him. Upon Government motion, appellant was held to be in contempt by

Judge Judd and committed to the custody of the United States Marshal for sixty days or until such time as appellant purged himself of the contempt.

On January 24, 1974, appellant before Judge Judd again moved for a motion to suppress and for bail pending appeal; the motions were denied. This Court denied appellant's application for bail pending appeal on January 28, 1974. The appellant remains in the custody of the United States Marshal.

Argument

Point I

> An immunized witness before the grand jury may not refuse to answer questions based upon or derived from interceptions of his oral communications where the Government has shown the interceptions were conducted pursuant to prima facie valid Court orders.

The District Court's holding that an immunized grand jury witness may not refuse to answer questions based on information derived from electronic surveillance where the Government has shown the interceptions were conducted pursuant to prima facie valid Court orders is a correct statement of the law. In Gelbard v. United States, 408 U.S. 41 (1972),[1] the Supreme Court held that where it was established that interceptions were unlawful as defined in Title III, a witness has standing to invoke the prohibition of 18 U.S.C. § 2515 as a defense to contempt charges brought on the basis of a refusal to obey a court order to testify. The Court opinion was based on the assumption that the interceptions were illegal under Title III.[2] In Gelbard (case no. 71-110), the Court noted in passing that "a federal district judge approved the wiretaps," 408 U.S. at 44, but remanded the case holding that "we need not decide whether Gelbard and Parnas may refuse to answer questions if the interceptions of their conversations were pursuant to court order. That is a matter for the District Court to consider in the first instance," 408 U.S. at 61, n.22. [3]

1/ Decided together with a companion case, United States v. Egan, No. 71-263.

2/ The Court said (408 U.S. at 47):

> We must also assume that the communications were not intercepted in accordance with the specified procedures and thus that the witnesses' potential testimony would be 'disclosures' in violation of Title III.

3/ In the companion case, Egan (No. 71-263), the Government has not replied to the witnesses allegations of illegal wire interceptions. The court of appeals in Egan noted that the Government did not at any time in the proceeding suggest that it did not employ wiretaps nor "deny that any electronic surveillance that may have been utilized was authorized by court order," and therefore the court assumed that the wire interceptions were illegal, 450 F. 2d 199, 201-202 (1971). Consequently, the issue for which Gelbard was remanded and which was decided in the instant case, never arose in the Third Circuit cases. In the Supreme Court the Government denied there was any interception at all, but the Court said that was a matter for consideration by the District Court, 408 U.S. at 61, n.23.

The opinion of the Court in Gelbard thus did not address the question here; what procedures are to be followed when a grand jury witness claims that questions are based on illegal interceptions and the Government states the interceptions were pursuant to Court orders. The Court, however, did suggest the answer to this question when it said, "Section 3504, [18 U.S.C. 3504] then, establishes procedures to be followed upon a claim by a party aggrieved that evidence is inadmissible because of an illegal interception. Section 3504 ... necessarily recognizes that grand jury witnesses may rely upon the prohibition of Section 2515 in claiming that the evidence sought from them is inadmissible in the grand jury proceedings..... Upon such a claim by grand jury witnesses, the Government ... is required ... to 'affirm or deny the occurence of the alleged' illegal interception," 408 U.S. at 54-55.

The opinion of the Court in Gelbard, in which four justices joined, stands for the proposition that a grand jury witness has standing to raise the issue of illegal electronic surveillance in defense of a contempt citation but as the District Court found here, the witness' claim is met when the Government shows the interceptions took place pursuant to prima facie valid court orders. The concurring opinion of Mr. Justice White, who cast the determinative vote in the 5-4 decision, indicates the procedure followed here by the District Court was correct. First he stated he agreed with the Court that a witness may refuse to answer, "at least where the United States has intercepted communications without a warrant in circumstances where court approval was required," 408 U.S. at 70. He then went on to comment on the issue before this Court (id):

> Where the Government produces a court order for the interception, however, and the witness nevertheless demands a full-blown suppression hearing to determine the legality of the order, there may be room for striking a different accomodation between the due functioning of the grand jury system and the federal wiretap statute. Suppression hearings in these circumstances would result in protracted interruption of grand jury proceedings. ... It is well therefore that the Court has left this issue open for consideration by the District Court on remand.

The considerations which might result in "striking a different accomodation" are set out in United States v. Calandra ___U.S.___, No. 72-73, decided January 8, 1974, slip op. at 11-12. In holding there that grand jury witnesses could not refuse to answer questions based on evidence seized in violation of the Fourth Amendment, the Court expressed concern about "the potential injury to the historic role and functions of the grand jury ..." which would be caused by lengthy suppression hearings. The Court noted at p.11 that permitting a witness to litigate suppression motions before a grand jury would,

> "... precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings. Suppression hearings would halt the orderly progress of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective. The probable

result would be 'protracted interruptions of grand jury proceedings' (citing Mr. Justice White in Gelbard) effectively transforming them into preliminary trials on the merits. In some cases the delay might be fatal to the enforcement of the criminal law. Just last Term we reaffirmed our disinclination to allow litigious interference with grand jury proceedings:

> 'Any holding that would saddle the grand jury with mini-trials and preliminary showing would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal law.' United States v. Dionisio, 410 U.S. 1, 17 (1973).

C.F. United States v. Ryan, 402 U.S. 53 (1971); Cobbledick v. United States, 309 U.S. 323 (1940). In sum, we believe that allowing a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of the grand jury's duties."

The same considerations which led the Supreme Court to refuse to permit grand jury witnesses to litigate lengthy motions to suppress under the Fourth Amendment in non-wiretap situations apply equally to lengthy motions to suppress under Title III and support the holding of the district court here. The majority opinion in Calandra distinguished that case from Gelbard on the grounds that Gelbard "rested exclusively on an interpretation of § 2515 and Title III..." Calandra, slip op. at 17, n.11. In light of the limited holding in Gelbard based on the assumption of illegality in the interception, however, this distinction should not be read as precluding the application of Calandra's general principle of not permitting collateral proceedings to interfere with grand jury functioning merely because the alleged illegality is based on electronic interceptions.

The two opinions are harmonized by interpreting them to permit the defense under 18 U.S.C. 2515 to preclude a contempt adjudication where, in response to the witness' motion, the Government admits unlawful interception; where, as in Gelbard, the allegation of unlawful interception was assumed to be true; or where the unlawfulness of the interception has been established in some other proceeding. But where, as here, the Government responds to the witness' allegation by showing the communications were intercepted pursuant to prima facie valid court orders, the Government has met its burden under Gelbard and any further pre-indictment inquiry by the witness would not lie.

The legislative history of Title III specifically refutes appellant's claim to a suppression hearing during a grand jury proceeding. The Senate Report. No. 1097, 90th Congress, 2d Session, 89 (1968) states:

"Section 2515 of the new chapter imposes an evidentiary sanction to compel compliance with the other prohibitions of the chapter. It provides that intercepted wire or oral communications or evidence derived therefrom may not be received in evidence in any proceeding before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision of this chapter. The provision must, of course, be read in light of Section 2518(10)(a) discussed below, which defines the class entitled to make a motion to suppress. It largely reflects existing law."

The Senate Report further defines § 2515 in § 2518 (10)(a):

> "Paragraph (10) (a) provides that any aggrieved persons, as defined in section 2510 (11), discussed above, in any trial hearing or other proceeding in or before any court department, officer, agency, regulating body or other authority of the United States, a State, or a political subdivision of a State may make a motion to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom. This provision must be read in connection with sections 2515 and 2517, discussed above, which it limits. It provides the remedy for the right created by section 2515. Because no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the content of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual. (Blue v. United States, 86 S. Ct. 1416, 384 U.S. 251 (1965).) There is no intent to change this general rule. It is the intent of the provision only that when a motion to suppress is granted in another context, its scope may include use in a future grand jury proceeding..."

1968 U.S. Code Cong. and Admin. News, p. 2195.

Despite appellant's confusion, the legislative history is clear in its denial of any right to a suppression hearing during a grand jury proceeding. Any reference to a civil contempt hearing as another "context" where a suppression motion would be entertained is at best an obfuscation of the role of a witness before the grand jury. The proper "context" is the forum in which testimony is sought to be adduced.

The District Court went beyond the dictates of Gelbard in that Judge Judd inspected the three orders in camera. Section 2518 (8) (b) provides "applications and orders shall be disclosed only upon a showing of good cause...". The legislative history, 1968 U.S. Code Cong. and Admin. News, pp. 2194-2195, states:

> "Paragraph (9) provides that the contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any Federal or State trial, hearing, or other proceeding unless each party not less than 10 days before the trial has been furnished with a copy of the court order under which the interception was authorized or approved. 'Proceeding' is intended to include all adversary type hearings. It would include a trial itself, a probation revocation proceeding, or a hearing on a motion for reduction of sentence. It would not include a grand jury hearing. Compare Blue v. United States, 86 S. Ct. 1416, 384 U.S. 251 (1966)."

In this matter, the appellant has not shown good cause to inspect the orders, applications, and affidavits upon which the interceptions were based. In fact all the appellant claims is, "There was electronic surveillance, ergo it was illegal." As the legislative history so clearly states, the grand jury is not a proceeding in which copies of the above named documents are to be disclosed. To amplify its position, the government refers to the Honorable John F. Dooling's decision in In Re Persico, 362 F.Supp. 713 (E.D.N.Y. 1973) in which the Court disagreed with the petitioner's motion for at least an in camera inspection of the orders. Judge Dooling held at p. 714,

> "But that in camera or ex parte examination at the basis of the order was the very role which the judge signing the order performed as required by Section 2518 (1), (2), (3), (4), and (5). There is no room for an argument that a second judge should track the steps of the judge who issued the order in the hope that the two might disagree. Judges of coordinate jurisdiction do not, except in the most extraordinary situations, have the function of reviewing each others orders."

The holding of the District Court strikes the proper balance between the competing interests of the witness' privacy and the societal interest in unimpeded grand jury proceedings. If the alleged illegality of the interception is shown without resort to a collateral proceeding, then just cause for the refusal to answer is established. If on the other hand, the government denies the interception, or as here, shows that it was conducted pursuant to a prima facie valid court order, then the witness must answer. If the interception is subsequently determined to be illegal, it may not be admitted in a subsequent trial against a party with standing to move for suppression. This and the civil remedies of Title III are adequate protection against possible governmental abuse, see Calandra, supra, slip op. at 13.

Point II

> 28 U.S.C. § 1826 is a codification of civil contempt practice with respect to recalcitrant witnesses in Federal Grand Jury proceedings.

Contrary to appellant's allegations, this appeal does not raise an issue as to the applicability of Rule 42 (b) F.R. Cr. P. The government moved to hold appellant in contempt under 28 U.S.C. § 1826. The statute is a codification of civil contempt practice with respect to recalcitrant witnesses in Federal grand jury and court proceedings. The legislative history clearly states confinement is civil, not criminal:

> "...The procedure is designed to codify present practice. See Giancana v. United States, 352 F.2d 921 (7th Cir.) cert. denied, 382 U.S. 959 (1965). The confinement is civil, not criminal; its purpose is to secure testimony through a sanction, not to punish the witness by imprisonment. As amended by the committee confinement is, therefore, limited to the life of the court proceeding or the term (including extensions) of the grand jury before such refusal to comply with the court order occurred, but in no event shall confinement exceed 18 months..."

1970 U.S. Code Cong. and Admin. News, p. 4022

Judge Judd in his response to appellant's claim that his confinement was punitive, stated the opposite, confinement was coercive. Transcript, January 24, 1974 hearing, pp. 9, 10. The record of this proceeding, case law [Shillitani v. United States, 384 U.S. 364 (1966); United States v. Handler, 476 F.2d 709 (2d Cir. 1973)], and the legislative history reflect that § 1826 provides for a civil contempt proceeding. Rule 42 (b) F.R. Cr. P. applies to criminal contempt; it is not the issue here.

Point III

> The government's description of appellant's immunity was not misleading.

The transcript of the January 23, 1974 hearing as well as appellant's brief, pp. 28, 29 clearly show the government fully informed the appellant as to the scope of his immunity protection from federal and state prosecution. A mere perusal of Stevens v. Marks, 383 U.S. 234 (1966) and Raley v. Ohio, 360 U.S. 423 (1959) indicate the gross disparity between those factual situations and the instant matter. Appellant's contention is unfounded.

CONCLUSION

For the reasons stated, the order adjudging appellant in civil contempt and directing his imprisonment should be affirmed.

Respectfully submitted,

Dated: February 4, 1974

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 1974, a copy of the Brief for Appellee was hand delivered to Nancy Rosner, 401 Broadway, New York, New York 10013, attorney for the appellant.

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